**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL CASE NO. 2 OF 2017**

**REPUBLIC……**

**…….PROSECUTOR**

**VERSUS**

**MERERI TETEKOR……**

**……..ACCUSED**

# J U D G M E N T

**1.** The Accused, **MERERI TETEKOR** was charged with the offence of ***Murder*** contrary to **Section 203 as read with Section 204** of the **Penal Code**. The particulars were that on the 5th day of March, 2017, at Sosian Ranch in Laikipia West Sub- County within Laikipia County, murdered TRISTAN VOORSPUY.

**2.** In support of the charge, the prosecution called 12 witness and I set out the summary of the evidence as follows.

**3.** PW1 testified that he was the security manager at Sosian Ranch

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Rumuruti. He had served as such for 7 years.

He recalled that on 5/3/2017 at about 11.30 a.m, he was at work when David Macharia reported to him that one Tristan Voorspuy (the deceased) planned to visit Romeo Hotel within Sosian Ranch riding horse. Despite warnings by PW1, the deceased insisted he would go and view the hotel which had been burnt down and talk to the pastoralists. He left.

**4.** PW1 telephoned the General Manger of Sosian Rach, one Mr. Shawn Outram and informed him about the deceased's move. Mr. Outram arrived and called for help form a friend who had a helicopter. A trip to Romeo hotel by PW1 and one Mr. Bernard only managed to trace the whitehorse used by the deceased and it appeared injured.

**5.** Outram dispatched a security guard, one Peter Lekochorumongi who returned with a report that he had seen the body of the deceased at the hotel site. The body had injuries in the chest which appeared to bullet wounds. The horse was never recovered.

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**6.** On cross examination, PW1 confirmed that security in the area was not good then as pastoralists had invaded the Ranches.

**7.** PW2 was Bareng Lampercht. He testified that he was working at Sosian Ranch as a relief manager. He tried to dissuade the deceased from going to talk to the pastoralists who knew him very well. The deceased still proceeded to the site.

**8.** PW3, Lucinda Mary Voorspuy, was the wife of the deceased. She confirmed that the deceased was a director at Sosian Ranch. On 4/3/2017, the deceased left Rongai for Sosian Ranch to review the security situation there and to see damage done by the burning of 3 houses in the ranch.

**9.** On the morning of 5/03/2017, the deceased sent her a text message stating the he had a peaceful but rather stressful night and that some cattle were being moved. She identified the deceased's phone in court. Later that day, she received information that the deceased was missing and at about 5.30 p.m, her son called her to inform her that he Deceased's body had been found. He and been shot dead.

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**10.** PW4, Archibald Vendrich Voorspuy testified that the deceased was his father. That he was called on the phone by MR. Shawn who wanted him to talk his father out of his instruction to go to the scene. Sometime in April he was called at Rumuruti Police Station and shown 2 phones. He identified one of them as the deceased's phone. It had the deceased's details and contacts that were his.

**11.** PW5, Peter Lteserwa Lekishorumongi told the court that he discovered the body of the deceased at Romeo Hotel after he was sent to look for him by PW1. He camouflaged himself as an ordinary tribesman in traditional shuka so that the pastoralists would not be hostile to him. He reported back at the main camp what he had found.

**12.** PW6 told the court that he was the general manager Sosian Ranch. He offered that the material time the ranch was practically under siege from numeral pastoralists.

**13.** He added that he had gone to Rumuruti to drop some officers when on return he learnt that the deceased had taken a horse to one of the houses that had been burned by the armed pastoralists. The deceased went missing. His body

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was discovered by one of the security officers who was not from the same tribe as the pastoralists occupying the ranch.

**14.** On cross examination, he testified that he did not know the gunman who shot the deceased nor the community he came from. He added that the Samburu and the Pokot were blaming each other for the murder. The house was never recovered.

**15.** PW7, Sergeant Jonah Kipkoech Ng'eno testified that he was in the company of P.C. Mwingirwa when they saw a young man running from the direction of Ol Moran Shopping Centre headed to the auction area. He kept looking behind him as if he was being chased. He passed them and ran to the market area where people were selling and buying sheep and goats.

**16.** He followed him and kept his eyes on him until he stopped. He joined a group of about 10 Pokot Morans who were standing about 300 meters from where he and PC Mwingirwa Were.

**17.** After a brief while one P.C. Nzomo emerged from the direction where the young man had ran from. He was

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running on inquiry, he said that he was chasing a suspect who had escaped from their motor vehicle.

**18.** The Sergeant told him about the young man he had seen running and where he had stopped.

**19.** The Sergeant and P.C. Nzomo asked for a motor cycle from a Samburu man who knew them. P.C. Nzomo rode the motor cycle and the 2 proceeded to where the Pokot morans were.

**20.** Just before they reached the group, the same young man he had seen running left the group and dashed into a nearby .....

**21.** The 2 abandoned the motor cycle and gave chase by foot. Just then, 3 police vehicles came and the 2 got help from them and they managed to arrest the suspect. He was put in an administration police vehicle headed to Ol Moran Police Station. The Sergeant learnt that the suspect was called Miren, the Accused herein.

**22.** On cross examination the witness said that he learnt the suspect had escaped from a CID Subaru vehicle. He also learnt the young man was a suspect in a murder case

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involving a Mzungu Ranch owner. He added that he was aware that Hon. Mathew Lempurkel, then MP Laikipia North had been arrested for the same murder.

**23.** PW8, David James Stewart Coulson identified the body of eh deceased to the pathologist, at the Lee Funeral Home.

**24.** PW9, Daniel Hamisi testified that he was working with Safaricom in the Security Department. He was an investigator and data analyst. He received a request dated 8/3/2017 from the Criminal Intelligence Bureau, Laikipia County in respect of mobile telephone No. 0715 922 401. The information sought was registration details of the account and call data (outgoing/incoming) from 5/2/2017 to 8/3/2017.

**25.** He extracted data showing that the account was registered in the name of one Trustan Maarten Voorspuy of National ID No. 29518485. The last activity on that number was an sms (incoming) on 5/3/2017 at 11.50.48 from Suyian Ranch.

**26.** The mobile paired to the number was IMEI 355158062879910. The message was sent by number 0733

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757 487. He produced a summary of the findings, the request dated 8/3/2017 and a certified copy of the data as exhibits.

**27.** He also acted on another request dated 30/3/2017 in respect of mobile handset IMEI No. 35515806879910. The request was for subscriber's details if registered and outgoing and incoming call data as from 19/3/2017 to 30/03/2017.

**28.** The findings were that the equipment was used by Safaricom account No. 0715 700 735 registered to one Mereri Tetekor of National ID No. 30501479.

**29.** He produced the request for call data dated 30/3/2017 and the certified copy of the data in evidence as exhibits. He produced a certificate under Section 65(8) as read with Section 106(B) of the Evidence Act.

**30.** PW10, Dr. Peter Muriuki Ndegwa performed a post mortem examination upon the body of the deceased on the 6/3/2017 of the Lee Funeral Home. He formed the opinion that the cause of death was head, chest and spinal injuries due to multiple gun shots at close range.

**31.** PW11, Margaret Wahu Maina, a Government analyst stationed at the Government Chemist Nairobi told the

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court that she received various items from No. 74701 CPL Peter Kosgei of DCI Laikipia.

These were;

1. A pair of blue jean trousers in a khaki envelope marked ‘‘B’’.
2. A BLUE FLOWERED underwear in a khaki envelope marked ‘‘C’’.
3. Blood sample in a bottle marked ‘‘D’’ deceased Tristan Masteen Voorspuy’’

**32.** On the 7th March 2017, at the laboratory of the Government Chemist’s Department Nairobi, and additional item was received from No. 74740 CPL Philip Mwangi of DCI Laikipia.

1. A blue shirt in a khaki envelope marked ‘‘A’’.

**33.** Findings;

1. The shirt (item A) was heavily stained with blood of human origin.
2. The pair of jean trousers (Item B) and the underwear (item C) were lightly stained with blood of human origin.

**34.** Her conclusions and Opinion were:

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1. The DNA profile generated from the blood stains on the shirt(Item C) matched the DNA profile generated from the blood sample (Item D) indicated of the deceased Tristan Masteen Voorspuy with a probability of a random match of 1 in $1.3 \times 10^{23}$.

**35.** PW12 testified that on 3/3/2017, he accompanied the DCIO SP Jason Mworia to Sosian Ranch on operational duties where some herders had invaded the ranch and were illegally grazing therein. There was a high state of insecurity and they had to use an armored vehicle.

**36.** On 4/3/2017, they received a report that some hotels had been burnt down. On 5/3/2017, they received a report that the deceased, a director of the Ranch had been killed.

**37.** PW12 added he knew one Joseph Josphat Ng'ethe Ndung'u was arrested in connection with the murder of the deceased and that Exhibit P1 (Nokia phone) was recovered from him. He confirmed too that Exhibit P6 (the other Nokia phone) belonged to the said Josephat and that Exhibit 7 P5

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(Itel phone) belonged to the Accused. Further that Josphat was not called as a witness by the prosecution.

**38.** He added that he did not know the specific officer who arrested the accused. That he was arrested by DCIO Laikipia East assisted by DCIO Nyahururu to arrest him. He did not know the circumstances of his arrest. Further that Jason Mworia is not a witness in this case.

**39.** Further that he was aware that DCIO Nyahururu has not been called as a witness in the mater. That he deceased's killers were unknown. They could have been Samburu or Pokot.

**40.** The witness added that he did not know the officer who prepared the exhibit memo form and forwarded it together with exhibits to the Government Chemist.

**41.** He did not know the role played by P.C. Peter Kosgei in the investigation if any. He does not know if he is witness in this case. Yet this is the officer who prepared exhibits and dispatched them to Government Chemist. Notably this officer was not called as a witness. PW12 was aware that CI Ndubi was OCS Ng'arua and is a witness in the

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matter. CI Ndubi did not testify. Though PW12 mentions in his statement that photographs were taken at the scene, none were produced.

**42.** PW12 further testified that a police helicopter was dispatched. The body of the deceased was located collected and transferred to Lee Funeral Home. He added that he accused herein was arrested by DCI Officers at Nyahururu and handed over to them in Laikipia East and subsequently charged.

**43.** Later some phones were recovered. One belonged to the deceased and 2 to suspects. The phones were handed over to PW12. He produced the 3 phones as exhibits.

**44.** In cross examination, PW12 confirmed that 3 persons were arrested in connection with the death of the deceased but only I was charged with the murder. He confirmed there was an information which contained 3 accused persons including the accused. That the charges against the other 2 were withdrawn.

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**45.** He confirmed that Hon. Mathew Lempurkerlel had also been arrested in connection with the death of the deceased. He stated that Mathew was arrested for incitement to invasion of the Ranch.

**46.** At the close of the prosecution's case, both parties did not make any submissions of a case to answer. The court found the Accused had a case to answer and placed him on his defence whereupon he undertook to give a sworn statement and call no witness.

**47.** Before the defence could be taken, there was escape from lawful custody by some suspects and the accused herein was one of the escapees.

**48.** The escape threw the trial into a spin forcing the prosecution to apply for the trial to proceed in the absence of the accused a plea that was acceded to by this court's ruling dated 15th June 2023.

**49.** Subsequent to this ruling, counsel for the accused did submissions. These submissions have raised a serious legal concern for reason that the accused having voluntarily absconded trial, he waived his right to be present at trial,

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meaning that he is not participating in these proceedings through counsel as that would be tantamount to rewarding his willful absence which has caused a warrant of arrest to remain in force.

**50.** Secondly, a counsel only acts under instructions from a client. Two issues arise; the submissions must then mean that counsel is in contact with the client thus being complicit in his absconding trial or the submissions are devoid of instructions and therefore irregular and untenable. My view is that the court would be perfectly in order to ignore such submissions. They shall be ignored as of being of no consequence.

**51.** I have had the occasion to consider the charge, the evidence in support thereof and the relevant constitutional and statutory provisions. Of determination is whether the prosecution has proved the charge against the accused person to the required degree which degree ought to be beyond reasonable doubt. The general question would be whether all the ingredients of murder have been proved.

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**52.** In the quest to find answers to this issue, it is settled law that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty. **(See *Ozaki and another v The State, Uganda v Sebyala& Others*, -Case No. 130 of 1988.[6]{1969} EA 204).**

**53.** This threshold was laid way back by Viscount Sankey L.C in **Woolmington vs. DPP [1935] A.C 462 pp 481** where he stated the law on legal burden of proof in criminal matters, thus;

> ***"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made***

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***out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''***

**54.** In **JOO vs. Republic [2015] eKLR,** the court held that:

***"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."***

**55.** The onus on the prosecution to prove the charge against the accused beyond reasonable doubt never shifts and there is no onus on the accused to prove his innocence. The evidence must be considered in its totality. In order to convict the evidence implicating the Accused must be certain and conclusive leaving no room for speculation or assumptions and thus erasing any doubts. Should a scintilla of doubt exist, the benefit as per the law goes to the accused.

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**56. Section 203** of the **Penal Code** defines murder in the following terms***:***

> ***"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."***

**57.** The ingredients of murder were explained in the case of ***Republic vs. Mohammed Dadi Kokane & & 7 Others [2014] eKLR*** as follows:-

> ***"1) The fact of the death of the deceased.***
> ***2) The cause of such death.***
> ***3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly***
> ***4) Proof that said unlawful act or omission was committed with malice aforethought."***

**58.** Thus, the central ingredients of the offence of murder are malice aforethought and an unlawful act or omission on the part of the accused.

**59. Section 206** defines malice aforethought in the following terms:

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;***
> ***an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

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***knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
***an intent to commit a felony;***
***an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."***

**60.** The question that arises in the instant case is whether there is any evidence on record tending to prove the above ingredients of the offence of murder against the accused person.

**61.** There was no doubt as to the fact of death of the deceased. There is ample evidence that the deceased died from gunshot wounds. The body of the deceased was properly identified at the time the post mortem was conducted.

**62.** As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person, it is clear that there was no direct evidence linking him to the death of the deceased. The prosecution case is purely based on circumstantial evidence. That evidence is found in the testimony of PW9 who testified that

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PExh 1, the handset proved to belong to the deceased had been activated by safaricom account/mobile number 0715700735 which, according to records, was registered in the names of the accused.

**63.** PW12 confirmed that PEXH 1, the phone belonging to the deceased was recovered from one Josphat Ng'ethe Ndung'u. It is instructive to note that the said Josphat was indeed one of the 3 persons initially charged with the offence herein and his charges were withdrawn with an indication that the state was to treat him as a witness. The record shows that he never testified in this case with the prosecution intimating that he was not traceable.

**64.** A scrutiny of PW12's evidence (and who is the investigating officer in the matter) reveals serious gaping holes in the chain of events from the murder of the deceased to the arrest and recoveries from the accused and from Josphat. For starters, PW12 did not arrest the accused. He states that the accused was arrested by the DCIO Laikipia East with the help of DCIO Nyahururu. Neither the DCIO

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Laikipia East nor the DCIO Nyahururu were called as witnesses in this matter.

**65.** Further that he was aware that DCIO Nyahururu has not been called as a witness in the mater. That he deceased's killers were unknown. They could have been Samburu or Pokot.

**66.** The witness added that he did not know the officer who prepared the exhibit memo form and forwarded it together with exhibits to the Government Chemist.

**67.** He did not know the role played by P.C. Peter Kosgei in the investigation if any. He does if he did not know if Kosgei was a witness in this case. He was aware that CI Ndubi was OCS Ng'arua and is a witness in the matter. Though he mentions in his statement that photographs were taken at the scene, none were produced. From the record, Kosgei and Ndubi were not called as witnesses.

**68.** It was absolutely necessary for the prosecution to link the recovery of PEXH 1 to the accused. The same was recovered from Josphat. Even though there is evidence of the handset being activated by a number registered in the names

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of the accused herein, without an explanation from Josphat on how the accused interacted with this phone, the evidence against him remains weak and falls far short of proving beyond reasonable doubt that the accused murdered the deceased.

**69.** No doubt the occurrences in the region at the material time were barbaric, retrogressive, criminal and unacceptable in a civilized society in this time and age, more so when happening in a country that prides itself of governance through the rule of law and with a progressive constitution that guarantees fundamental rights and freedoms of all including the right to own property.

**70.** The disturbances must have posed a serious challenge to law enforcement officers and this may explain the uncoordinated investigation in this case. The result is that the charges against the accused are not proved beyond reasonable doubt. He benefits from the doubts thereof and is acquitted under Section 324(3) of the Criminal Procedure Code.

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**Dated signed and delivered in open court this 8th day of October, 2025.**

**A.K. NDUNG'U**

**JUDGE**

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